IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 14

MILLSAPS COLLEGE, Plaintiff in Error,

vs.

CITY OF JACKSON, Defendant in Error.

SUPPLEMENTAL STATEMENT AND BRIEF FOR DEFENDANT IN ERROR AND IN REPLY TO THE REPLY BRIEF FOR PLAINTIFF IN ERROR.

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(30,749)

## SUBJECT INDEX.



### Table of Cases Cited.

OTHER AUTHORITIES CITED

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## SUPPLEMENTAL STATEMENT AND BRIEF FOR DEFENDANT IN ERROR AND IN REPLY TO THE REPLY BRIEF FOR PLAINTIFF IN ERROR

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The brief for defendant in error was filed herein nearly two years ago, and since that time divers pertinent decisions, both in the Supreme Court of Mississippi and in this Court, have been made, whereunto we ask attention.

The Supreme Court of Mississippi has always been quick to co-ordinate its holdings with the holdings of

this Court on Federal questions, and to strike down any system of taxation violative of the Federal Constitution (*Riley vs. Agey & Land Tie Company*, 113 So. Miss., 214; *Miller vs. Illinois Central Railroad Co.*, 111 So. Miss., 558).

Construing the exemption statutes of Mississippi, it was held in *Smith vs. Mutt*, 111 So. Miss., 590, that land owned by King's Daughters was not exempt from taxation, because, said the court:

> "Chapter 183 of the Laws of 1918 (Section 6878, Hemingway's Code Supplement) provides, among other things, that:
>
> "The following property, and no other, shall be exempt from taxation, to wit: * * * (4) All property, real or personal, belonging to any religious or charitable society, and used exclusively for the purpose of such society, and not for profit. * * * (5) Property appropriated to and occupied and used by a hospital or charitable institution."

The question involved is ruled by *Touchs vs. City of Jackson*, 109 So. Miss., 864. It was held in that case that a church lot, adjoining a lot on which the church building was situated, and not used for church purposes, except that a plank walk for entrance to the church was maintained thereon, was not exempt from taxation by the above statute. The court said in that case that "this statute exempts only that property belonging to a religious society; that is, (1) used for the purposes of such society, and (2) not to any extent for profit. Both of these elements must coexist, or the

property remains subject to taxation;" and that the first of these elements was absent; that the use of the land for ingress and egress to the church by means of the plank walk was not such a use as brought the land within the statute.

*Smith vs. Myatt*, 111 So. Miss., 509, *supra*, holds:

> "The same conditions are required by the statute for the exemption of property owned by a charitable institution as are required for the exemption of property owned by a religious institution. It must be used exclusively for the purposes of the charitable institution. The getting of a few loads of fire-wood off of a 40-acre tract of wild land is too insignificant to constitute the use of the land. And the fact that, when the King's Daughters sold the land, they turned the proceeds of the sale into their treasury, and used the same for charitable purposes, was not such a use of the land as the statute contemplates. It was a use of the proceeds of the land. If that were such a use as the statute contemplates, the King's Daughters could engage in the purchase and sale of lands for profit, provided they used the profits for charitable purposes."

It thus appears that under this statute there must be both ownership of and utilization for the purpose of such society before there could be any exemption, and this decision of the Supreme Court, thus declaring, prevents this Court from in any way considering the claimed exemption, because the construction of the

local statute claimed to grant the exemption is conclusive here.

Furthermore, *Johnson vs. Mississippi Baptist Hospital*, 106 So. Miss., page 1, held that a nurses' home, appurtenant to a hospital belonging to the church, was not exempt and pretermitted deciding whether or not the ownership of this land upon which the hospital stood was violative of the statute as interpreted in *Church vs. City of Meridian*, 126 Miss., 780; 89 So., 650; *Gunter vs. City of Jackson*, 130 Miss., 637; 114 So., 844.

Adverting to the decisions in this Court, *Port Neat Marsh Valley Canal Co. vs. Brown*, U. S. Advance Op., Co Op. Ed., June 15, 1927, 756, hold that the construction of a State statute and the status of liens created under such statute is purely a local question on which the decision of the local court is conclusive.

In *Hope Natural Gas Co. vs. Hall*, U. S. Adv. Op., June 1, 1927, 720, this Court held that in determining whether a State statute violates the Commerce Clause of the Constitution it will consider only the final decree of the State court construing the statute, and accept the statute so construed and applied, uninfluenced by language contained in the opinion of the State court.

So here, the statute under which the alleged exemption was granted has been made the basis of a definite decision, and having so been definitely construed as not to cover the authorization to own land by the endowment fund, the decision of the State court is thereunder conclusive.

In *Fidelity National Bank vs. Swope*, U. S. Adv. Op., May 2, 1927, 559, the effect of the local decision construing the local statute was held conclusive.

In *Swiss Oil Corp. vs. Shanks*, U. S. Adv. Op., March 15, 1927, 410, the court held that in cases involving the constitutionality of a State statute, the construction by the State court of the local statute would not be open to review in this Court; and where, as here, that statute is manifestly properly construed, without any intention to subvert Federal rights, no Federal question is presented.

In *Missouri vs. Public Service Corp.*, U. S. Adv. Op., February 1, 1927, 360, the court held that ordinarily it only considered Federal questions, and did not concern itself with questions of local State law. The same ruling was made in *Hanover Fire Ins. Co. vs. Carr*, U. S. Adv. Op., December 15, 1926, 224.

In *Herbert vs. Louisiana*, U. S. Adv. Op., November 11, 1926, 111, this Court held that where there were two statutes (precisely as here) the decision by the local Supreme Court as to the operative effect of these statutes was a question which was solely for that court to solve.

In the instant case the alleged special exemption was granted at a time when the statute alleged to deny was in full force and effect, and these two statutes, concurrently existing, were for decision by the local court, which held that the alleged special exemption could not be operative, because it had not been granted to the college to thus invest its money, contrary to a settled policy of the State.

Church land ownership has always been severely frowned on by the laws of Mississippi, and at the last session of the legislature the question was again reviewed, and what might be owned by the churches was specifically defined by Chapter 194, Laws of 1926, it being there declared:

> "Any religious society, ecclesiastical body and or any congregation thereof, may hold and own, at any one place, the following real property, but no other, viz:
>
> "(*a*) Each house or building used as a place of worship with a reasonable quantity of ground annexed to such building or house.
>
> "(*b*) The house or houses used as parish house or houses, community house or houses, Sunday school house or houses, or house or houses of a similar nature, as may be reasonably necessary, together with a reasonable quantity of ground thereto annexed.
>
> "(*c*) Each house used for a place of residence for its minister, bishop or representative in charge of a district, conference or convention, together with a reasonable quantity of ground thereto annexed.
>
> "(*d*) A hospital or infirmary and a nurses' home in connection therewith, together with a reasonable quantity of ground thereto annexed.
>
> "(*e*) All buildings used by a school, college or a seminary of learning, contiguous to and or a part of the college or seminary plant, for administration, class rooms, laboratories, observatories, dormitories, and for housing the faculty and students thereof, together with a reasonable quantity of land in connection therewith.

"(*f*) All buildings used for an orphan asylum or institution, together with a reasonable quantity of ground used in connection therewith.

"(*g*) All buildings used for a camp ground or assembly for religious purposes, together with a reasonable quantity of land in connection therewith.

"(*h*) Lands for a cemetery or cemeteries of sufficient dimensions."

It will be perceived that the public policy enunciated by the Supreme Court in this decision directly accords with subdivision (*e*) of Chapter 194, Laws of 1926.

In the matter of land ownership, conditioning it by local requirements, the legislature stands supreme, and it has said that no church should thus violate public policy by owning that which the statute condemns. It will be further noted that all property other than that specifically exempted is required by said chapter to share its just proportion of taxation.

In *City of Jackson vs. Edwards House*, 110 So. Miss., 231, there was an exemption granted hotels which the Supreme Court held invalid, in virtue of the provisions of the Constitution, the Court saying:

"If this judgment should be construed to authorize a county or municipality to grant the exemption therein provided to particular hotels, and not, at the same time, to all other hotels of the character described in the statute, it would violate section 112 of the Constitution, which applies to municipalities (*Adams v. Bank*, 73 Miss., 701; 23 So., 395), and under which all property of the same class must be taxed alike.

"In order to be valid under Section 192 of the Constitution the statute must be construed, not as authorizing a county or municipality to exempt particular hotels within its jurisdiction and of the character therein described from taxation, but as authorizing them to exempt all such hotels from taxation for a period of five years. Equality of taxation as one of the dominant notes of our present Constitution is expressly required by Section 112, and was not intended to be departed from in Section 192 thereof.

"(2) Neither Section 192 of the Constitution nor the statute here enacted pursuant thereto contemplates or authorizes a special exemption applicable only to a particular hotel, but, on the contrary, they both contemplate a general exemption embracing all property of a particular class. The exemption here claimed should have been granted not to the appellee specifically, but to all hotels within the city of Jackson of the character described by the statute."

Here, the alleged exemption is to a specific corporation, not to a class, and should be declared void on the same ground as was done by the learned Circuit Judge, whose reasoning is thus confirmed.

In reply to the Reply Brief of plaintiff in error, we submit:

POINT I

**Jurisdiction**

(A) Section 4251, Code of 1906, was not utilized by the Supreme Court in deciding this cause adversely

to plaintiff in error, and was not, directly or indirectly, integrated into the decision, which would have been what it was had said Section 4251 never been heard of.

But, assuming for the sake of argument, *contra*, said Section 4251 has been continuously in effect and was coexistent with the charter of the college. This is demonstrated by the quotation of the statute made in the original brief, 42 *et seq.* the Code of 1906 was only the inclusion into "one Code * * * of such general laws of a general nature as are now in force" (Laws, 1904, Ch. 100).

(B) Judgment for costs is not appealable, but judgment in the instant case is appealable, and all parties thereto must have joined in the writ of error.

A judgment for costs is not appealable, but plaintiff in error takes this writ of error from a judgment at law wherein relief was denied; to this judgment there were three parties—plaintiff in error, Buie and Lampton. Neither Buie nor Lampton joined in the writ of error, and thereby no jurisdiction exists here, as judgments in Mississippi at law, are entireties.

## POINT II.

### Charter Not Subject to Repeal or Modification.

The declaration of the charter is that the college could "do and perform *all other acts* for the benefit of said institution and the promotion of its welfare, that are not repugnant to the Constitution and laws of this State or the United States" (italics ours), and this operated to vest power in the legislature to co-

ordinate the conduct of the college with the public welfare.

Section 1 of the charter declared that "the college might accept donations of real and personal property for the benefit of the college * * * and contributions of money or negotiable securities of every kind in aid of the endowment of such college * * * and do and perform all other acts for the benefit of said institution and the promotion of its welfare that are not repugnant to the Constitution and laws of this State or of the United States."

This clause, "that are not repugnant to the Constitution and laws of this State," controls the right to accept donations of realty and to accept contributions of money and negotiable securities. It follows the express power to act, and further to "do and perform all other acts." "Other acts" and the precedent expressly authorized acts are both equally followed by this relative clause, co-ordinating all action to and with the Constitution and laws of Mississippi and of the United States.

There can be no other construction possible, because the word "other" brings into review all that has preceded it, and there would be no sound reason to sever and divide the co-ordination with law of that done under authorization "of all other acts" and allow the institution to violate the public policy of the State as to the donation of real and personal property and contributions of money or negotiable securities. Each, with deference, stands upon the fundamental condition that it conformed to the laws of the State of Mis-

sissippi, and this covenant is the precise equivalent of a reservation of the right to alter, amend, or repeal.

Under no viewpoint could these words, "repugnant to the Constitution and laws of this State," become words of enlargement and not "of limitation." These words are of limitation and limit all that precedes, and, so limiting, vest that which is essential to preserve the public welfare of Mississippi.

## Point III.

### As to Power of the College to Hold Property.

Counsel direct attention to *Adams County vs. Catholic Diocese of Mississippi*, 110 Miss., 366; 74 So., 17. The reference by plaintiff in error is unfortunate, in this:

The Catholic Diocese of Natchez owned certain realty utilized for supporting certain orphanages, and it claimed exemption, first, under Section 4251*d*, which is the statute here relied upon as impairing the obligation of the contract here, and also under Section 4252 of the Code, and the court said:

> "The question presented here is whether or not these two pieces of property, not being used exclusively for the purposes of such religious society, but were leased and bore revenue in rent, are subject to taxation under the laws of Mississippi. Section 4251 of the Code of 1906, providing what property shall be exempt from taxation in the first sentence of Clause "d" of the section reads:

"'All property, real or personal, belonging to any religious or charitable society and used exclusively for the purpose of such society and not for profit.'

"While this provision was then in Section 3744, Code of 1892, the case of *Ridgely vs. Rodus*, 78 Miss., 352; 29 South., 163, was decided, holding that a benevolent order on the lodge system was not entitled to exemption from taxation of property owned by the lodge not being used exclusively for the purpose of such charitable society. And while this case was pending on appeal to the Supreme Court the Legislature enacted Section 4252, Code of 1906, which reads as follows:

"'All public libraries and building in which the free public schools are taught, and the lots on which the same are situated, not exceeding four acres in dimensions, without cost to the State or any county or municipality thereof for rent or lease, and also the real and personal property of library associations, used for library purposes where no dividends are declared, and to which the children attending the public schools have free access; and all the property, real and personal, and the revenues derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county and municipal taxes.'

"The appellant urges that there can be no exemption here under Section 4251 of the Code of 1906, as this statute was construed in the

case of *Rebecca Lodge vs. Redus, supra,* in which the court said in substance that under the facts in that case the exemption could not be maintained, as the property was used for profit and not for charity, and that even though the income from the property be used for charity, yet under the statute, Section 4251, Code of 1906, the exemption could not be sustained. *We agree with counsel for appellant that under Section 4251, Code of 1906,* the appellee could not maintain exemption from taxation of the property here in question, but we think that the appellee *may safely rely upon Section 4252,* Code of 1906, to sustain its contention that the property in this case is exempt from taxation in this State. Counsel for appellant urges that there is a conflict between Sections 4251 and 4252, and that this conflict cannot be read harmoniously together, and that Section 4252 repeals Section 4251." (Italics ours.)

Thus, the Supreme Court held expressly in *Adams County vs. Catholic Diocese,* following the earlier decision of *Rebecca Lodge vs. Redus,* 78 Miss., 352; 29 So., 163, that where property was used for rental purposes, it was subject to taxation; the Court specifically declaring that the exemption awarded in the *Adams County* case attached under Section 4252, Code of 1906, to which plaintiff in error in no way refers and on which plaintiff in error in no way places any reliance.

Note, also, the construction of this section in *New Standard Club vs. McRae,* 71 So. Miss., 290:

"The main contention of appellant is that it is a charitable society, and that the property

in question is used exclusively for the purpose of such society, and not for profit. The answer of the defendants sets out, however, that the New Standard Club is a social organization, and that the main purposes of its existence is to furnish a place of meeting for the entertainment of the members of the Club, their families and their friends; and that the dispensation of charity is merely an incidental feature. In the case of *Odd Fellows vs. Boston*, 78 Miss., 352; 29 South., 161, construing Section 3744, Code of 1892, paragraph "d" (Section 4251, Code, 1906, being practically a re-script thereof), this Court, through Judge Terral, said:

"'The lodge claims that this property is exempt from taxation under paragraph 3744, Code, which exempts all property, real or personal, belonging to any charitable society, used exclusively for the purposes of said society, and not for profit. The exemption can not be maintained. It does not come within the letter of the act. The property is used for profit, and not for charity, and so cannot be exempt. It is said in argument that the income is used for charity, and that makes it the same in effect as if the property itself was used for charity. But that is not the letter of the law, nor its spirit.'

"The complainant club is a social organization, not a charitable society, though it does some charity. The property in question is used for a club house and not for any charitable use. Neither the property in question, nor anything growing out of it, is devoted to charitable uses and purposes, nor is there any pretense that this property is exempt upon any other ground

> named in said subsection "*d*" of Section 4251, Code, 1906; therefore, we conclude that said property is not exempt thereunder."

But, again, the question of the illegal holding of this property was not in any way directed to the court's attention in *Adams County vs. Catholic Diocese*, and, hence, it does not constitute on that point a decision (*L. R. Co. vs. Adams*, 77 Miss., 278, following *Cross vs. Burke*, 146 U. S., 86).

See, also, *Lucken vs. Seal*, 91 So., 389; *State vs. Lomello*, 70 Miss., 711; *United States vs. Sawyer*, 144 U. S., 221.

When the precise question did come to the Supreme Court, as to the illegal holding, the court decided it squarely in the cases of *Church vs. City of Meridian*, 126 Miss., 780; 89 So., 620, *supra*; *Gunter vs. City of Jackson*, 130 Miss., 687; 94 So., 844, *supra*.

The reference to the Act of 1926 cannot be made effectually retroactive to release taxes upon property illegally owned at the date of the assessment thereof.

Said Section 2, to which reference is made, declares:

> "The title to real property * * * now owned by any religious society * * * be and the same is hereby validated, and such society, body or congregation is authorized and empowered to continue to own the same, or to convey or encumber the same."

But this did not, as at a prior date, divest the liability for taxes of property that at that time was so illegally held. The status of this land in 1926 in no wise concerns this Court. The validity of that section is

exceedingly questionable, with deference, under the State constitution.

But, however this may be ultimately decided, at the time that this was imposed, this property, office buildings, was held for rent, and being held for rent, was illegally held, and subject to taxation.

## Point IV.

### Millsaps College is Engaged in Business Within the Purview of the Mississippi Decisions.

Counsel for plaintiff in error overlooked *Ridgeley vs. Rader*, 78 Miss., 352; 29 So., 163, where only a portion of the property was rented. They overlook, specifically, the holding in *Gunter vs. City of Jackson*, 130 Miss., 657; 94 So., 844, and, also, *Smith vs. Myatt*, 111 So., 580, for well might was declared in the Myatt case), "if that were such a use as the statute contemplates, the Kings Daughters could engage in the purchase and sale of lands for profit, provided they used the profits for charitable purposes."

Renting an office building certainly is the doing of business. Visualize the ownership of, say, the Equitable Building in New York, by a religious corporation, and the Millsaps Building in Jackson, under consideration, is in the same category. The difference is in degree only.

As pointed out, Mississippi has been very particular about allowing religious corporations to own land, and the charter of Millsaps College is very unusual in this, that it specifically provides

> "And said corporation, and college established by it, shall be subject to the visitatorial powers of said conference at all times, *and the said college, its property and effects shall be the property of said church* under the special patronage of and jurisdiction of said conference." (Italics ours.)

Thus eliminating, substantially, any individuality from Millsaps College, and making of the property here in controversy, directly the property of the church for the purposes of this case.

POINT V.

**Construction by the State Court Correct.**

The analysis of the statute made by the State court is so manifestly correct, and the reasons supporting it so absolutely unanswerable, that we make no further reply thereto.

POINT VI.

Note, specifically, please, the reference to the Code of 1857, and, further, the decisions of the Supreme Court referred to on page 114, and, with deference, the same cannot mislead.

We, therefore, insist with the utmost confidence, first, that this Writ of Error must be dismissed; or, if retained, affirmed for the reasons stated in the opinion by the Supreme Court of Mississippi; but if this Court should take jurisdiction, and disagree with the Supreme Court of Mississippi on its construction, then